***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-2039

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,

*Plaintiffs-Appellants,*

*vs.*

BETTY FURNESS, Commissioner,
Department of Consumer Affairs, City of New York,

*Defendant-Appellee.*

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CIVIL ACTION—ON APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SAT BELOW: HON. C. B. MOTLEY, J.U.S.D.C.

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# BRIEF OF APPELLANTS



WILLIAM J. CONDON,
*Attorney for Plaintiffs-Appellants,*
420 Lexington Avenue,
New York, New York 10017

*Of Counsel:*
CARPENTER, BENNETT & MORRISSEY,
744 Broad Street,
Newark, New Jersey 07102

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1

# TABLE OF CONTENTS

TABLE OF CONTENTS



CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

## STATEMENT OF THE CASE

Plaintiffs, all milling companies who produce and distribute wheat flours throughout the nation, instituted this action on June 6, 1973, by filing a complaint in the United States District Court for the Southern District of New York (JA9a). The court's jurisdiction was invoked under the provisions of 28 U.S.C. §§1331(a), 1332(a) and 1337. In their complaint plaintiffs sought a declaratory judgment on the constitutionality of §833-16.0 of the Administrative Code of the City of New York. Plaintiffs also requested injunctive relief against defendant, the Commissioner of the Department of Consumer Affairs of the City of New York, to restrain enforcement of §833-16.0 against retailers of their flours. On July 6, 1973, plaintiffs moved for a preliminary injunction against defendant (JA26a). Defendant filed her answer on October 5, 1973 (JA28a), and, at the same time, moved for summary judgment dismissing the complaint, or in the alternative, judgment on the pleadings (JA48a).

A hearing on the motions was scheduled for November 15, 1973, but was adjourned until January 28, 1974. At this hearing the following questions were before the court:

> 1) whether §833-16.0 prohibits variations from stated net weight of prepackaged commodities and, therefore, violates the requirements of due process of law;
>
> 2) whether the administrative procedures employed by defendant's agents in enforcing §833-16.0 are arbitrary, unreasonable, capricious and violate the requirements of due process of law;
>
> 3) whether §833-16.0 constitutes an illegal attempt on the part of the City to regulate and burden interstate commerce;

4) whether §833-16.0 constitutes an illegal attempt on the part of the City to legislate in an area pre-empted by Congress; and

5) whether plaintiffs were entitled to a preliminary injunction prohibiting the enforcement of §833-16.0 against their packages of wheat flours during pendency of this action.

The facts relied upon by the parties for support of their respective motions were presented exclusively by affidavit. The court announced its decision in Opinion dated February 22, 1974 (JA131a), in which it found that: (a) §833-16.0 does allow for variations from the stated-net weight of prepackaged commodities and, therefore, does not violate due process requirements; (b) the administrative procedures employed by defendant's agents in enforcing §833-16.0 are reasonable and proper; and (c) §833-16.0 is neither preempted by nor in conflict with Federal legislation in the field of package labeling regulation. The court declined to pass on whether §833.16.0 illegally burdens interstate commerce but expressly limited plaintiffs in their proofs at trial to that single issue. The court denied plaintiffs' application for a preliminary injunction and granted defendant's motion for a summary judgment in part. An order embodying the ruling was filed March 8, 1974 (JA139a).

Trial on the remaining issue was held on April 29, 30, and May 1, 1974. After plaintiffs rested their case, the trial judge granted defendant's motion to dismiss the complaint (JA308a-09a). A written opinion to this effect was filed on July 3, 1974 (JA322a). In the interval between the close of trial and the issuance of the court's written opinion, plaintiffs filed a motion for injunctive relief pending appeal pursuant to *Rule* 62(c), F.R.C.P.

(JA312a). This motion was denied by the trial court in Memorandum Opinion and Order dated June 26, 1974 (JA320a).

Plaintiffs filed their Notice of Appeal and Bond on July 25, 1974 (JA327a), and now seek review by the Court of the various rulings of the trial court denying plaintiffs a preliminary injunction, granting defendant a partial summary judgment, denying plaintiffs a permanent injunction and dismissing plaintiffs' complaint. The record on appeal was filed with the Court on September 3, 1974.

## STATEMENT OF ISSUES PRESENTED

I. Whether the trial court erred in entertaining defendant's motion for a summary judgment since there clearly existed genuine unresolved issues of material fact.

II. Whether the trial court erred in holding that neither §833-16.0 of the Administrative Code of the City of New York nor the administrative practices and procedures of defendant in enforcing said ordinance operates to unconstitutionally deprive plaintiffs of due process of law.

III. Whether the trial court erred in holding that §833-16.0 of the Administrative Code of the City of New York is neither preempted by nor in conflict with the Federal legislation in the field of package labeling regulation.

IV. Whether the trial court erred in holding that §833-16.0 of the Administrative Code of the City of New York does not constitute an illegal attempt on the part of the municipality to burden interstate commerce.

V. Whether the trial court erred in denying plaintiffs both a preliminary and a permanent injunction prohibiting the continued enforcement of §833-16.0 of the Administrative Code of the City of New York against their packages of wheat flours.

## STATEMENT OF FACTS

Section 833-16.0 of the Administrative Code of the City of New York ["the ordinance"], which is at the center of this controversy, purports to deal with the labeling of prepackaged commodities and reads in pertinent part:

> §833-16.0 *Sale by true weight or measure required*— It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . . .

At various times in the months both prior and subsequent to the filing of the complaint, weights and measures inspectors of the Department of Consumer Affairs of the City of New York ["the Department"] cited a number of bags of plaintiffs' wheat flours as being "underweight" contrary to the provisions of the ordinance and issued citations for alleged violations to the retailers on whose shelves the allegedly offending bags appeared.[1] Plaintiffs contend that these citations are illegal because both the ordinance and the administrative practices employed by the Department in enforcing the ordinance are unconstitutional.

### A. *The nature of wheat flours*

#### 1. THE MILLING PROCESS

A wheat kernel in its natural condition arrives at the mill with a moisture content of between 11 and 12%.

1. At the hearing on the motion for summary judgment, January 28, 1974, defendant's counsel remarked that during the preceding six years, 1967 to 1973, only twenty violations had been cited by the Department against General Mills flours and only sixteen had been cited against Pillsbury (JA 123a). However, since that time matters have changed drastically. At this writing there are now several hundred alleged violations of §833-16.0 outstanding.

Moisture is the catalyst which permits the efficient fractionation of the kernel and thereby promotes the ultimate objective of the milling operation which is the separation of the various parts of the wheat kernel into end products of farina, flour, germ, shorts and bran (JA168a-69a).

The milling process is comprised of two operations: (a) cleaning and conditioning and (b) grinding and separation. The cleaning and conditioning process includes "tempering" which is the addition of moisture to increase the wheat kernel's moisture content to approximately 15½ to 16%. The purpose of this is to toughen the outer bran coat of the kernel (pericarp) so that it will flake rather than shatter in the course of grinding, thereby permitting a clean separation of the pericarp from the endosperm (the inner portion of the wheat kernel). Failure to temper properly will result in poor separation of endosperm from pericarp and, consequently, too much bran in the flour and too much flour in the bran (JA168a-70a).

After tempering, the remainder of the milling process results in reduction of the moisture level in the end product. Thus, patent flour, which in each case was the type of flour cited by defendant's inspectors, has a moisture content of 13 to 14% (JA169a).

### 2. The packing process

The packaging of wheat flour by plaintiffs is totally mechanized. The equipment employed is expensive and sophisticated and weight control procedures have been established to insure that all packages of flour produced are full weight at the time they leave the mill. In addition, plaintiffs stamp a code number on each package which reflects the time and place of manufacture. This, in turn, will lead to the quality control records on that

particular package, including the moisture level at the time of manufacture (JA190a-93a).

### 3. THE HYGROSCOPIC CHARACTER OF WHEAT FLOURS

Wheat flours are foods which, by definition of the Secretary of Health, Education and Welfare, have a moisture content of "not more than 15%." 21 C.F.R. §15.1. They are also hygroscopic substances, which means that their moisture content (and, perforce, their weight) fluctuates with changes in the relative humidity of the surrounding atmosphere. A bag of wheat flour will retain its original packed weight or gain weight when stored in an atmosphere where the relative humidity is high, while that same bag of flour, if stored in an atmosphere where the relative humidity is low, will lose weight.

The definitive study of the hygroscopicity of flour is Anker, Geddes and Bailey, *A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Humidities*, a copy of which was before the trial court at the January 28, 1974, motion hearing and was later admitted into evidence at trial (Ex. P1, JA327ab). The study concluded that when atmospheric conditions are characterized by low relative humidity and warm temperatures, such as found in stores and heated warehouses in the colder portions of the United States during the winter months,[2] a package of flour will lose a significant percentage of its weight due to evaporation of moisture content. In fact, Table IX of the Study shows that flour with a moisture content of 13½% when packed may lose 6.2%

2. As revealed by the meteorological investigations of Professor A. Vaughn Havens of Rutgers University, indoor relative humidities of less than 20% are commonplace in New York City during the winter months. (JA 262a-64a; Ex P4a-c, JA383-88a).

of its weight if exposed to an atmosphere of 20% relative humidity and as much as 8.8% of its weight if exposed to an atmosphere of 10% relative humidity.[3] However, such fluctuations due to absorption or evaporation of moisture content do not vary the quantity of dry ingredients in the package, nor do they affect the flour's nutritional value (JA171a). Moreover, any deficiency in the flour's moisture content is compensated for by the universal practice of adding liquid to the flour when it is used.

## B. *The statutory and regulatory framework*

Throughout the course of these proceedings defendant has contended that her administration of the ordinance is in consonance with Federal and State statutes and regulations and is, therefore, proper. The Federal statutes involved are the Food, Drug and Cosmetic Act, 21 U.S.C. §301, *et seq.*, and the Fair Packaging and Labeling Act, 15 U.S.C. §1451, *et seq.* §403 of the Food, Drug and Cosmetic Act [21 U.S.C. §343(e)] expressly permits variations from stated-net weight of prepackaged commodities and the regulations which have been jointly promulgated under the two acts set forth two types of permissible variations from stated-net weight: (1) variations due to unavoidable deviations in good manufacturing practice (packing errors), and (2) variations caused by loss or gain of moisture during the course of distribution (hygroscopic variations). 21 C.F.R. §1.8b(q).

An examination of New York state law reveals the existence of a system of weights and measures which is identical in relevant respects to the Federal program. Article 16, §180 of the New York Agriculture and Markets Law empowers the Commissioner of Agriculture and

3. Also see Affidavit of Malcolm W. Jensen ¶7, JA91a.

Markets to establish allowable variations for weights and measures. The regulations promulgated by the Commissioner pursuant thereto acknowledge the existence of two permissible variations from stated-net weight of prepackaged commodities: (1) variations caused by unavoidable deviations in good packaging practice, and (2) variations due to exposure to conditions that normally occur in good distribution practice and result in change of weight. Title 1, Ch. V, §221.8, New York Code of Rules and Regulations.

### C. *The administrative practices of the department*

In administering and enforcing the ordinance and assessing the legality of variations from stated-net weight or prepackaged commodities (including hygroscopic substances), defendant's inspectors rely upon certain "guidelines" set forth in Handbook 67 of the National Bureau of Standards entitled, *Checking Pre-packaged Commodities* (Ex. P3, JA352a). (Defendant's Statement Pursuant to *Rule* 9(g) ¶5, JA81a-82a). The specific table employed by the inspectors appears at page 8 and is entitled "Unreasonable Minor or Plus Errors" ["the Table"] (JA363a). According to the Table, packages of commodities ranging anywhere from zero ounces to 101 pounds are entitled to certain tolerances ("minus errors" or "plus errors") before a variation from stated-net weight will be considered "unreasonably large."

During the course of this litigation, it has become clear that defendant's inspectors apply the Table in *all* instances of variations from stated-net weight including, of course, packages of plaintiffs' wheat flours. If a particular variation exceeds the standards of the Table, the inspector will cite the package as being in violation of

the ordinance and order it off-sale. However, under no circumstance will the inspector attempt to ascertain whether the variation was due to a packaging error or loss of moisture content through evaporation (we are leaving aside the question of damaged bags), nor will he undertake to determine whether the bag has been the subject of "good distribution practices." Moreover, he does not confiscate the bag for use as evidence at any later proceeding. (Affidavit of Betty Furness, ¶¶6-8, JA50a-52a; Defendant's Statement Pursuant to Rule 9(g) ¶5, JA81a-82a).

## D. *The purpose and proper application of the table*

Throughout, plaintiffs have disputed the reasonableness of the Department's practice of assessing the legality of any variation from stated-net weight of prepackaged commodities by comparing the size of the variation with the standard set forth in the Table. Plaintiffs have maintained that the Table may only be properly and reasonably employed to determine the permissibility of one type of variation—packaging deviations.

In support of this position and in opposition to defendant's motion for a summary judgment, plaintiffs submitted the affidavit of Malcolm W. Jensen, the author of both Handbook 67 and the Table.[4] According to Mr. Jensen, the standards contained in the Table were based upon data which dealt exclusively with variations due to to packaging deviations, thus, to use the Table to assess the legality of any variations other than those due to packaging errors would be improper and unreasonable.

4. Mr. Jensen's credentials as an expert on weights and measures practices are quite impressive. He spent twenty years with the United States Department of Commerce in the weights and measures field and he was, for six years, the Chief of the Office of Weights and Measures of the National Bureau of Standards (Affidavit of Malcolm W. Jensen ¶1, JA91a-92a).

• • •

4. The said table of "Errors" was based solely upon information which was collected by me or under my supervision with respect to errors in the weight of packaged commodities which resulted from "deviations" at the time of packaging either because of the nature of the commodity or the limitations of the packaging machinery or of humans involved in the packaging or check-weighing operation. The said figures have nothing whatsoever to do with "variations" in the weight of hygroscopic commodities which occur, after the packing process is completed, as the result of a gain or loss of moisture caused by changes in the relative humidity to which the commodity is exposed.

• • •

7. On the basis of my personal knowledge and experience, it would be inappropriate to use the table of "Errors" which appears at page 8 of Handbook 67 as a guide to the "reasonableness" of variations in the weight of a hygroscopic commodity caused by changes in its moisture content as the result of exposure to changing relative humidity. [Affidavit of Malcolm W. Jensen ¶¶4 and 7, JA92a-93a, 95a].

With regard to the Department's practice of judging the legality of all variations from stated-net weight by reference to the Table, Mr. Jensen voiced the following opinion:

8. I have read in the "Affidavit in Opposition" filed in this case and sworn by Betty Furness on November 5, 1973, in her capacity as Commissioner of the New York City Department of Consumer Affairs. In that affidavit she states in substance that weights and measures inspectors in her department and elsewhere use the "objective federal guidelines contained in Handbook 67" to determine whether or not moisture loss in packages of hygroscopic foods is the result of

> "ordinary," "customary" and "unavoidable" exposure occurring in "good distribution practice." As the author of Handbook 67, I am constrained to say that such use of the so-called "objective federal guidelines" (meaning the table of "Errors" appearing at page 8 of Handbook 67) is a misuse of the Handbook and indicates a misunderstanding of the nature, source and purpose of the so-called "guidelines." [*Id.*, at ¶8, JA95a-96a].

## E. *Analysis of certain bags of plaintiffs' flours alleged to have violated the ordinance*

Because defendant's agents do not confiscate or otherwise preserve the bags of wheat flours which they cite for violating the ordinance, plaintiffs have encountered great difficulty in obtaining any such bags for submission to chemical analysis. Plaintiff General Mills was, however, able to recover several packages which an inspector of the Department found to be "underweight" at the Pantry Pride Supermarket at 187-04 Horace Harding Expressway, Queens, on March 8, 1973. These packages were submitted to the United States Testing Company of Hoboken, New Jersey, an independent laboratory, for analysis of their weight and moisture content. On April 3, 1974, the testing company submitted its report (JA22a). A comparison of the test results with the relevant quality control records revealed that each package had lost moisture weight equal to or in excess of the variation found by the defendant's inspector. Thus, each of those thirteen allegedly underweight bags was full weight and contained an accurate statement of net quantity of contents in terms of weight when packed. (Plaintiffs' Statement Pursuant to *Rule* 9(g) ¶¶22-24, JA88a; Schedule "B" of Complaint, JA25a).

# ARGUMENT

## POINT I

**The trial court erred in entertaining defendant's motion for a summary judgment because there existed genuine, unresolved issues of material fact.**

The record clearly discloses the existence of controverted issues of material fact on the summary judgment motion. Chief among these was whether the procedures employed by the Department in administering the ordinance (*i.e.*, the application of the Table's standards to every variation from stated-net weight) are reasonable. Plaintiffs, of course, took the position that such procedures were illogical and irresponsible and in support thereof submitted the Jensen affidavit. Defendant, on the other hand, presented no evidence to rebut Jensen's assertions, perhaps since to do so would have underscored the existence of an issue of fact. Instead, at the hearing, defendant's counsel ignored the Jensen affidavit (except for a passing *ad hominem* reference to the affiant) and argued that the Table spoke for itself with regard to its proper application. However, since nothing was done to remove this question from the case, the outcome of motion depended in large part upon resolution of this issue of fact.

In complete disregard of the mandate of *Rule* 56, F.R.C.P., the trial court made an express finding of fact on the question of the reasonableness of the Department's administrative procedures as, indeed, it had to before it could reach a decision on the motion.[5] However, in doing so it committed an error mandating reversal.

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5. "Defendant . . . could have rationally concluded that, ordinarily, weight variations other than those indicated on p. 8 of Handbook 67 were unjustified." (JA136a).

## POINT II

**The trial court erred in holding that §833-16.0 and defendant's administration thereof do not violate the due process provisions of the Fourteenth Amendment to the United States Constitution.**

On the basis of a partial record and in the face of genuine unresolved issues of material fact, the trial court granted defendant summary judgment on the questions of whether the ordinance and the Department's administrative procedures with regard thereto violate due process. It ruled that the ordinance permits variations in stated-net weight and that the Department's use of the Table in all situations involving variations is reasonable and proper. Aside from the fact that the trial court acted improperly and precipitously in even considering defendant's motion for a summary judgment, it is clear from the record which was before the court that its rulings were incorrect.

### A. *The ordinance is so rigidly drawn as to deny plaintiffs due process of law*

As written, the ordinance makes no mention of variations from stated-net weight of prepackaged commodities either due to packaging error or to gain or loss of moisture content.[6] Nor has the Department, or any other City agency, promulgated any regulation in which such variations are recognized. On its face, at least, the ordinance is at odds with the Federal and State statutes and regulations all of which make express allowance for such variations. If the ordinance is as narrow as it would appear and

6. At the outset it should be noted that all of the violations involving plaintiffs' wheat flours have been charged under §833-16.0. To plaintiffs' knowledge, defendant's agents never issued any violations against their flours under State law.

allows of no variations from stated-net weight, it unquestionably violates the requirements of due process and must be stricken. *Overt v. State*, 260 S.W. 856 (Tex. Crim. App. 1924).

To escape this ineluctable conclusion defendant has contended that the ordinance is sufficiently flexible to allow for variations. Her principal argument in support of this contention is that it has been the Department's practice to allow for variations when administering the ordinance. However, since nowhere in the Administrative Code of the City of New York is there any mention of variations, defendant has had to range far afield to find justification for this practice.

Noting her dual role as the individual designated by the City Charter to enforce all municipal weights and measures laws and as the City Sealer under §183 of the New York Agriculture aand Markets Law, defendant asserts that she is entitled, or more precisely, bound to apply the State regulations in her administration and enforcement of the ordinance. Precisely what justification exists for this practice has never been made clear. There is nothing in the State statute or regulations which supports such an assertion nor is any mention of this procedure made in the Administrative Code. It must be concluded, therefore, that the scope of the State regulations is irrelevant to the question of the ordinance's rigidity and such regulations which permit variations cannot be engrafted upon the ordinance at the whim of defendant or her agents.

Admittedly, administrative practice can be of assistance to a court in matters of statutory construction but in order to be of assistance such administrative practice must find some basis in legislation or regulation; it is not

self justifying as defendant would have us believe. *See Fed. Maritime Comm. v. Seatrain Line, Inc.*, 411 U.S. 726 (1973); *St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines*, 262 F.2d 738 (3rd Cir. 1959). Moreover, defendant's administrative practices are certainly no more enlightening and carry no more weight with regard to the proper construction of the ordinance than does her own failure to have promulgated regulations thereunder allowing for variations from stated-net weight. *See F.T.C. v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

The few cases in which the ordinance and its predecessor, §388 of the Administrative Code of the City of New York, have been the subject of judicial scrutiny do not provide us with a clear understanding of the perimeters of the ordinance. *Emerald Packing Corp. v. Hygrade Food Products Corp.*, 23 Misc.2d 915, 200 N.Y.S.2d 534 (App. Term. 1960) (*per curiam*); *City of New York v. Sulzberger & Sons*, 80 Misc. 660, 141 N.Y. Supp. 876 (App. Term. 1913); *City of New York v. Marco*, 58 Misc. 225, 109 N.Y. Supp. 58 (App. Term. 1908). However, it can at least be said that defendant can find no express authority in case law for her contention that the ordinance permits variations in stated-net weight.

Unlike the State and Federal statutes and regulations which expressly permit variations from stated-net weight of prepackaged commodities, §833-16.0 and the regulations thereunder are completely silent in this regard. Defendant has pointed to her own administrative practices as proof that the ordinance permits variations and, yet, these practices seem to have evolved of their own accord since there exists no authority for them. It is clear, then, that the challenged ordinance does not allow of variations from stated-net weight and is, therefore,

unconstitutionally rigid. *Overt v. State, supra.* Consequently, the trial court erred in holding that §833-16.0 is not violative of due process of law.

## B. *Defendant is administering and enforcing the ordinance in an arbitrary, unreasonable and unconstitutional manner*

Even if we are to assume that §833-16.0 is sufficiently flexible to permit variations from stated-net weight of prepackaged commodities, plaintiffs were still entitled to injunctive relief because defendant's agents are administering the ordinance unconstitutionally.

### 1. THE DEPARTMENT'S PRACTICES CONSTITUTE A MISUSE OF THE TABLE

There can be no doubt that defendant's agents are employing the Table to assess the legality of hygroscopic variations.[7] This is a clear misuse of the Table. The Table was never intended to be used to judge hygroscopic variations. Moreover, there has been no evidence presented to the effect that, although not designed for this purpose, the Table somehow finds a rational application to the ascertainment of the legality of hygroscopic variations. Simply stated, it is not possible to properly and rationally determine the legality of *all* variations from stated-net weight by reference to the Table and, thus, defendant's agents are administering the ordinance in an arbitrary, capricious and unconstitutional manner.

7. By applying the Table to all variations from stated-net weight, defendant's agents are obviously employing it to determine the legality of hygroscopic variations. Proof of this is found in the fact that of the 13 alleged underweight bags which plaintiff General Mills submitted to analysis (Statements of Facts D, supra, p. 12) each was found to be free from any packaging deviation. Thus, each variation in these bags was the result of flour's hygroscopic nature. Indeed, plaintiffs submit that the great majority of all alleged violations of the ordinance are the result of hygroscopic variations in excess of the completely irrelevant Table.

## 2. THE LEGALITY OF HYGROSCOPIC VARIATIONS MAY NOT BE DETERMINED BY FIXED STANDARDS

Throughout the course of this litigation defendant has contended that the guidelines set forth in the Table may be used to determine the legality of *any* variation from stated-net weight. Although this contention was unsupported by authority and contrary to the proofs, the trial court concurred. This position is clearly erroneous, However, even if it were true that its drafter created the Table with the purpose in mind of affording weights and measures officials a standard by which the legality of all variations could be ascertained, the facts clearly demonstrate that he has failed.

As noted above the two types of variations from stated-net weight of prepackaged commodities permitted under Federal and State law and, presumably, allowable under the ordinance are: (1) variations caused by deviations in good manufacturing practice (packaging errors); and (2) variations due to gain or loss of moisture content during good distribution practive (hygroscopic variations). These variations differ radically in nature and, because of this, only the former can be rationally ascertained by reference to the Table or any other standard which makes the size of the variation determinative of its legality.

When dealing with a variation which is the result of a packaging error the ultimate question is whether the deviation occurred in "good manufacturing practice;" if it did then it is permissible; if it did not then it is illegal. Years of investigation and practical experience have shown that the best evidence of the presence or absence of good manufacturing practice is, in fact, the size of the deviation itself. This is because packaging machines, including those used in the milling industry, have attained such a

high degree of sophistication that they can be calibrated to pack within very small tolerances of the target weight. Thus, the packaging practices in question can be appraised by reference to an objective standard which focuses on the size of the variation. Either the machine has packed within these well-recognized tolerances or it has not, there are no other factors relevant to the inquiry. The Table affords precisely such a standard and plaintiffs have never challenged its reasonableness as a gauge of its manufacturing practices.

While the legality of a packaging error may rationally be determined by its size alone, it is clear that a hygroscopic variation cannot be similarly assessed, there being far too many causal factors involved. Each such variation must be investigated individually, the crucial question being whether the individual package has been subjected to "good distribution practices." The size of a particular hygroscopic variation is irrelevant to this inquiry because identical variations may result from either "good" or "bad" distribution practices. Indeed, it is entirely conceivable that of two hygroscopic variations in identical packages of a commodity, the larger variation may be permissible and the smaller illegal.[8]

Because the size of a hygroscopic variation is not evidence of the presence or absence of good distribution practices, any attempt to establish the legality or illegality of such a variation by reference to its size is unreasonable. Even if the Table purported to be a gauge of the legality of hygroscopic variations (and, thus, of the presence of good distribution practices) it would be unsuited to the

8. For instance, a 6% moisture-weight loss resulting from uncontrollable conditions of extremely low relative humidity could occur during good distribution practice and, hence, be legal. Whereas, a 1% moisture-weight loss resulting from the package being stored next to a heat source could be due to bad distribution practices and, therefore, illegal.

purpose since it has reference only to the size thereof. Thus, in any event, the Department's practice of determining the legality of all variations by application of the Table is irrational, unreasonable and arbitrary.

### 3. THE PROPER PROCEDURES TO BE FOLLOWED IN ADMINISTERING THE ORDINANCE

Since the administrative practices employed by defendant's agents in determining the legality of a particular variation from stated-net are not reasonably calculated to achieve this objective they are arbitrary and illegal. Proper administrative procedure would require the following of defendant's agents:

> (1) once a prepackaged commodity is determined to have a variation from stated-net weight, ascertain the cause of such variation;
>
> (2) if the variation is the result of a packing error, apply the guidelines of the Table to determine permissibility; or
>
> (3) if the variation is due to the hygroscopic nature of the commodity enquire as to the distribution practices to which the package has been subjected (*i.e.*, where the package has been stored on the shelf and in the warehouse, for how long, the atmospheric conditions, etc.).

Admittedly, the procedures respecting hygroscopic variations will require some effort on the part of defendant's inspectors but due process requires nothing less. In fact, such procedures are expressly set forth in Handbook 67.

> Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight thorugh the increase or decrease in moisture content, beginning immediately after the packaging occurs.

> The Model Regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure • • • to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure." The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.
>
> It is admitted that such inde es as "ordinary and customary exposure" and "good distribution practice" are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is "customary exposure" and what may be considered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture [JA357a-58a].

At the January 28th hearing the state of the record was such that plaintiffs were clearly entitled to the relief which they sought. Defendant had admitted that it is the practice of her agents, once any variation from the stated-net weight is discovered, to compare the size of the variation with the Table and, if in excess of those guidelines, issue a citation. Defendant contended that the Table's guidelines are applicable to both types of variations, however, she introduced no evidence to prove that her interpretation of the Table is correct or that her agents' all-encompassing application thereof is reasonable and proper. Plaintiffs, on the other hand, offered extensive proofs on the arbitrary, capricious and unreasonable

character of the Department's procedures in administering and enforcing the ordinance. They even went so far as to produce the affidavit of the individual who drafted the Table. It was this person's candid opinion that the Department's across-the-board application of the Table is an obvious abuse thereof.

Despite the fact that all the relevant and probative evidence indicated that the Department is administering the ordinance unconstitutionally, the trial court granted summary judgment in favor of defendant and denied plaintiffs' request for an injunction. In so doing it committed reversible error.

## POINT III

**The trial court erred in holding that §833-1.0 is not in conflict with and, therefore, not preempted by Federal legislation in the field of package label regulation.**

Judge Friendly's decision in *Swift & Co. v. Wickham*, 230 F. Supp. 398 (S.D.N.Y. 1964) (three-judge court), *aff'd*, 364 F.2d 241 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967), indicates that Congress has not evidenced the intention to occupy the field of food-package labeling to the total exclusion of State and local legislative participation. Indeed, §12 of the Fair Pacakging and Labeling Act, 15 U.S.C. §1461, would support this conclusion since it provides that State or municipal legislation in the area is superseded where such legislation establishes requirements which are "less stringent than or require information different than" the requirements of the Act. State or municipal participation in the labeling area, though circumscribed, is permitted. However, it is aximotic that where, under the facts and circumstances of a particular case, State or local law conflicts with Federal

law and stands as an obstacle to the accomplishment of the purposes and objectives of Congress the State or local law must yield under the Preemption Doctrine. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380-81 (1969); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); 15 U.S.C. §1461. In this case the ordinance clearly conflicts with paramount Federal law and is, therefore, void.

### A. *The ordinance's failure to allow for variations from stated-net weight conflicts with the Federal labeling program*

Both Federal legislation [21 U.S.C. §343(e)] and regulation [21 C.F.R. §1.8b(q)] expressly permit variations from stated-net weight of prepackaged commodities. The ordinance, however, is so narrowly drawn that it permits no such variations. An obvious conflict exists and, since the courts cannot redraft the ordinance, it must be stricken.

### B. *The ordinance establishes a minimum-weight-labeling requirement which conflicts with the Federal mandate that a label contain an accurate statement of net quantity of contents*

The problem of how to cope with hygroscopic variations in packages of plaintiffs' flour is one which has long resisted easy solutions. Defendant, however, appears to be untroubled by this since she has advanced the astoundingly facile proposal that plaintiffs simply understate content weight at the time of packing, *i.e.*, overpack the bags to such an extent that, regardless of how much moisture is lost during distribution, its contents will at least equal stated-net weight when the bag is sold to the consumer.

> THE COURT: Do you suggest that they could take care of the moisture loss which they claim is responsible for the short weight here simply by understating the true weight by a few ounces?
>
> MS. MODRY [defendant's counsel]: I don't think there is any doubt about it, your Honor.
>
> THE COURT: And that would not in any event violate the New York ordinance?
>
> MS. MODRY: No, your Honor.
>
> THE COURT: As you say, it seems unlikely that it would be held to violate the federal or state law, is that it?
>
> MS. MODRY: That is correct [JA124a].

The trial court was wholeheartedly in favor of this solution and even referred to it in its Opinion on the motions (JA137a). However, the simple fact is that plaintiffs cannot overpack their bags of flour since to do so would cause them to run afoul of the Federal requirement that each package of their wheat flours contain "an accurate statement of the quantity of contents in terms of weight." 21 U.S.C. §343(e); 15 U.S.C. §1453.

In this regard we invite the Court's attention to the Brief of the United States as Amicus Curiae in *General Mills, Inc., et al. v. Jones,* (Nos. 74-1051 and 73-3583) now pending before the United States Court of Appeals for the Ninth Circuit.[9] The brief, which was submitted by Thomas E. Kauper, Assistant Attorney General, and Gregory B. Hovendon, Chief, Consumer Affairs Section, addresses itself to, among other things, a minimum-weight labeling regulation recently adopted in California. Cal. Adm. Code, Title 4, Ch. Subch. 2.1. The following,

9. A copy of this brief was submitted to the court at trial. (JA295a-96a).

which is expressly adopted by plaintiffs, is the position of the enforcement arm of the Federal government with respect to minimum-weight labeling tactics such as defendant and the trial court have urged upon plaintiffs:

* * *

"The minimum-weight labeling scheme which California has adopted in response to the lower court's opinion in this case might be regarded by some as having advantages. As a regime oriented to the individual purchase, it would assure that each purchaser receives at least as much value as he thought he was getting. It is, however, not the system Congress chose for this country. Instead, 21 U.S.C. 343(e) commands that the weight stated be accurate, not underweight and not overweight.

"Other than to offer the purchaser the ability to know if his particular needs will be satisfied by the quantity he is buying, the main purpose for weight labeling is to aid in the determination of cost. Only by knowing both the price and the weight of the package can a purchaser derive accurate information on the cost of the product, and only when the same information is known about competitive products can accurate comparisons be made. A minimum weight labeling system does not allow the purchaser to make an accurate computation of cost. In a minimum-weight system, where all packages must be above the stated weight, there will still be variations in package weights caused by the unavoidable deficiencies of the filling machinery. But instead of these variations clustering near the stated weight, they will cluster around some unknown weight above the stated weight. The price of packages will, of course, be set in consideration of their average actual weight, not their stated weight. Consequently, the purchaser, who cannot determine the amount

of overfill, and therefore cannot determine the weight on which the price is based, is less able to calculate the true cost of the product. Moreover, in making comparisons between products, there is no way of a purchaser's knowing whether different manufacturers have selected the same percentage of overfill. The choice is thus between knowing the least possible value of a package or knowing the actual value of an average package. The latter choice would seem to be much more useful to consumers over time and is the result of the accurate-weight system adopted by Congress. In any event, Congress has spoken, and its choice in favor of accurate weight must be observed.

"Similar reasoning to that permitting reasonable variations due to filling machinery errors underlies the policy permitting some variation from stated weight for gain or loss of moisture. Any kind of measurement is meaningful only when the conditions under which the measurement is made are understood. The length of metal bar for example, varies with the temperature, and the weight of a given volume of gas depends on the pressure it is under. Similarly, with food a common problem is the amount of moisture it contains. A package of flour that is five percent heavier than another is not worth any more if the additional weight is just water. Consequently, the moisture content of a package of flour must be known before its value can be understood or compared with other packages of flour.

"The problem of labeling packages when unavoidable gain or loss of moisture occurs after a package of flour leaves the manufacturer cannot be easily solved. The statute requires "accurate" labeling, but the inevitable gain or loss of moisture is unpredictable, and compliance with the terms of the statute is therefore extremely difficult. Moreover, even if moisture changes for a particular

lot of flour could be estimated and the packages overfilled or underfilled accordingly, thereby complying with the letter of the statute, value comparisons would be distorted unless all lots of flour to be sold in competition with it had been overfilled or underfilled to the same extent. One package, for example, might be overfilled more than another in anticipation of longer transportation or storage times or of intermediate storage under especially dry conditions. Although both packages might have the same actual weight by the time a consumer buys them, the originally-heavier package would in fact be more valuable. Loss of water might have equalized the weights, but the originally-heavier package would have started with more flour solids, and it would still have more. Looking only at the prices and the stated weights, the consumer would have no idea which package was more valuable. Ironically, in the case of flour, strict adherence to the letter of the statute produces a useless result that is wholly inconsistent with the intent of the statute.

"There is no perfect solution available to accommodate the difficulties of natural phenomena to the congressional mandate for labeling of accurate weight and to the need to provide consumers with useful information. The Food and Drug Administration has, however, developed a complete regulatory scheme for flour, which goes a long way toward that end, but which was ignored by the lower court in this case. Under present regulations, the maximum moisture content of flour is fixed by 21 CFR 15.1(a) at 15 percent at the time it is packaged, and the package is accurately labeled as to its weight at that time. If there is subsequent gain or loss of moisture, that change does not affect the value of the product. If a package has lost five percent of its weight because of moisture loss, the package is nevertheless still equivalent

to the stated weight at the Government-specified moisture level. Only the valueless water has disappeared; the nutrient solids are still entirely present. 21 CFR 15.1(a) combines with 21 CFR 1.8b(q) to create a workable elaboration of the labeling statute, one that seeks to effect the intent of the legislation. In the case of packaging and labeling flour, an unthinking insistence on accurate labeling of weight at the time of retail sale does not necessarily best serve the needs of consumers. If moisture content is not considered, the stated weight may be extremely deceptive.

* * *

"The lower court in this case properly recognized that Federal standards preempt state law in regard to labeling requirements . . . . The test for Federal preemption is whether the state regulation can be enforced without impairing the federal superintendence of the field. . . . A holding of federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. . . . *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).[10] As it is impossible for a package to be labeled accurately in accordance with Federal weight-labeling standards and at the same time to be labeled in accordance with a different medium-weight state standard, Federal law govern[s] The pertinent Federal statute, 21 U.S.C. 343(e), de[fi]nitely sets

10. In *Florida Lime* the Supreme Court left open the question of whether the challenged California statute unnecessarily burdened interstate commerce. Some nine years later plaintiffs filed a second action in which they challenged the statute as imposing an unconstitutional burden upon interstate commerce. *J. R. Brooks & Sons, Inc. v. Reagan* (N.D. Cal. No. C-73-1311 S.C., decided Sept. 18, 1973). After two weeks of trial the three-judge District Court concluded that the challenged statute unconstitutionally burdened interstate commerce and enjoined the enforcement thereof.

the rarely achievable standard of accuracy and depends on enforcement discretion to carry out its fair administration. No package will ever have so accurate a label that sensitive measuring equipment cannot detect a discrepancy. Enforcement policy thus is crucial to achievement of the substantive requirements: since most packages will vary from the stated weight, the enforcement policy cannot be arbitrary, but must encourage labeling as close to accuracy as possible.

"It is well-settled that the supremacy clause (U.S. Const. Art. VI) requires state programs to respect Federal policy as well as the letter of Federal statutes. See, e.g., *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967); *Farmers Educational and Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). To avoid inconsistency with Federal law and policy, state enforcement policy must therefore support the Federal requirement of accurate labeling. A state policy of prosecuting short-weight packages, no matter how little the actual weight is less than the stated weight, would be inconsistent with Federal law and policy and would be barred by the supremacy clause. Such a policy would compel manufacturers to overfill packages in order to avoid sanctions for unavoidable variations, and a tendency away from accurate labeling would thereby be encouraged. State enforcement policy must therefore recognize unavoidable variations if it is to be consistent with the Federal statutory requirement of accurate labeling. In short, the policy embodied in 21 CFR 1.8b(q) must be recognized in state law whether or not the Federal regulation exists. Its existence clarifies that requirement and avoids a misinterpretation of the kind California has made in its recently promulgated regulations." [pp. 12-17].

If we are to assume that the ordinance allows for variation from stated-net weight we are left with the con-

clusion reached by both defendant and the trial court that the ordinance establishes a minimum-weight labeling scheme for hygroscopic substances. Such a scheme is clearly forbidden by Federal law and, therefore, the Preemption Doctrine applies to void the ordinance.

## POINT IV

**The trial court erred in holding that §833-16.0 does not constitute an illegal attempt on the part of the municipality to burden interstate commerce.**

There exists no one sure test for deciding whether a State or local law constitutes an unconstitutional burden upon interstate commerce and each case must be decided on its particular facts. *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714 (1963). Clearly, the mere fact that the challenged law affects commerce in some way does not constitute an unlawful burden. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963). However, where the burden upon interstate commerce created by the law in question is clearly excessive in relation to the benefit to the legitimate local public interest sought to be effectuated thereby, the law is unconstitutional. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Regardless of whether the ordinance is read as prohibiting variations, as plaintiffs suggest, or as establishing a minimum-weight labeling scheme, as defendant and the trial court contend, it is clear it unlawfully burdens interstate commerce and must be stricken. Under either interpretation plaintiffs, and those similarly situated, will be required to alter their entire packaging and labeling procedures. The expenditure of time, effort and money will be staggering. And to what purpose? The consumer,

who ostensibly is the local public interest sought to be protected, will not be benefited one whit by this alteration. Indeed, he may well be harmed thereby as noted by the Attorney General in his brief. Thus, not only does the ordinance wreak havoc upon interstate commerce but it is not capable of effectuating the putative local interest.

## POINT V

**The trial court erred in denying plaintiffs both a preliminary and a permanent injunction against enforcement of the ordinance against their packages of wheat flours.**

The evidence which was before the trial court both at the January 28th hearing and the trial clearly demonstrated that plaintiffs were suffering grave and irreparable injury as a result of the unconstitutionality of both the ordinance and the Department's administrative practices. The court's failure to grant them the requested injunctions constitutes clear error.

## CONCLUSION

For the reasons cited above, appellants request that the trial court's Orders of March 5, 1974, June 26, 1974, and July 3, 1974, be vacated, its several decisions reversed and judgment for appellants entered, or such other relief be granted appellants as the Court deems appropriate.

Respectfully submitted,

/s/ William J. Condon
WILLIAM J. CONDON
*Attorney for*
*Plaintiffs-Appellants*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Appeal
Docket No. 74-2039

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; and SEABOARD ALLIED MILLING CORPORATION, a corporation,

Plaintiffs-Appellants,

vs.

BETTY FURNESS, Commissioner, Department of Consumer Affairs, City of New York,

Defendant-Appellee.

AFFIDAVIT OF SERVICE

STATE OF NEW JERSEY :
ss.
COUNTY OF ESSEX :

JAMES R. LAMB, being duly sworn, according to law, upon his oath deposes and says:

1. I am an associate with the firm of Carpenter, Bennett & Morrissey, Esqs. who are of counsel to appellants in the above-entitled action.

2. On Thursday, October 10, 1974, I served two copies of Brief of Appellants, one copy of Joint Appendix and one copy of Exhibits on Adrian P. Burke, Esq., Corporation Counsel for the City of New York, Municipal Building, New York, New York 10007, attorney for appellee, by mailing same in a sealed envelope, properly addressed, postage prepaid, Certified Mail, Return Receipt Requested, at the United States Post Office, Woodbridge, New Jersey.

James R Lamb
James R. Lamb

Sworn and subscribed to
before me this 10th day
of October, 1974

Patricia M. Kertis
Patricia M. Kertis

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 23, 1973

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CARPENTER, BENNETT & MORRISSEY
744 Broad Street
Newark, New Jersey 07102